IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE STARBUCK,

Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,

Appellees.

On Direct Appeal from the Final Judgment of a Three Judge United States District Court Sitting in the Western District of New York

REPLY FOR APPELLANTS

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REPLY FOR APPELLANTS

This reply is submitted on behalf of the above named appellants in support of their brief and in answer to briefs filed by State University Counsel and the Attorney General of the State of New York, attorneys for "Bd. of Trustees *et al.*" and "Bd. of Regents *et al.*", respectively.

POINT I

We are now told by the "Bd. of Regents *et al.*" that Sections 3021 of the New York Education Law and 105(3) of the Civil Service Law should not be considered by this Court as "pertinent to our inquiry". We are further informed that appellants seek to "obfuscate" the real issues in this case "by dragging in every law that has ever been enacted in the State of New York relating to subversive activity . . ." (Brief for Bd. of Regents *et al.*, p. 15). Any confusion in this case has not arisen from any misconception of the issues on the part of appellants. It should be pointed out that the argument of appellees with respect to the non-applicability of Sections 3021 and 105(3) *is made here in this Court for the first time.* In fact, the appellees have consistently defended the constitutionality of these sections through three courts of the federal system (as well as in their motions to dismiss appellants' Statement as to Jurisdiction filed with this Court). Indeed, on the basis of arguments made by the appellees, Judge Henderson, in originally dismissing appellants' application for a temporary injunction stated that Section 3021 had been clarified (*Keyishian, et al. vs. Board of Regents, et al.*, 233 F. Supp. 752 at p. 753). In the Court of Appeals for the Second Circuit, the appellees declared "Section 3022 implements Section 3021" and further, they stated:

> "Because subdivision (3) of Section 105 of the Civil Service Law is, except for the new clarifying sentence, the same as Education Law, Section 3021, it is not new to the issue in this case if Section 3021 is not new.
>
> We submit Section 3021 is not new". (Brief for Bd. of Regents *et al.* in the Second Circuit.)

It has been observed that the Court of Appeals reversed and remanded the action to be heard by a three man court.

The court's holding that a substantial federal question is presented is significant in that the holding is partly based on the fact that "*Adler* . . . refused to pass upon the constitutionality of Section 3021 . . . [and that] . . . several statutory amendments, such as Section 105(3) of the Civil Service Law are all subsequent to *Adler*" (*Keyishian, et al. vs. Board of Regents, et al.*, 345 F. 2d 236 at p. 238).

In argument to the three judge court, the appellees continued their defense of the above mentioned sections without raising a hint that they did not believe them to be "pertinent". Thereafter, that Court found "constitutional Section 105 of the Civil Service Law, Sections 3021 and 3022 of the Education Law . . ." (*Keyishian, et al. vs. Board of Regents, et al.*, 255 F. Supp. 981 at p. 994). Thus, three federal courts have passed upon and held Sections 3021 and 105(3) to be a part of the present complex and applicable to the present appellants. Appellants also point out that the appellees entered into a stipulation of fact in the Court below which contained the following provisions:

> "Section 3022 incorporates in full by reference and implements Section 105 of the Civil Service Law and Section 3021 of the New York State Education Law as follows: . . . Subdivision (1) of Section 3022, as amended by Chapter 681, Laws, 1953, directs the Board of Regents to adopt and enforce rules and regulations for the elimination of persons barred from the employment of the public school system or any college or institution of higher education owned by the State of New York or any political subdivision thereof, by reason of violation of any of the provisions of Section 105 of the Civil Service Law or Section 3021 of the New York State Education Law. For precise provisions of these statutes, reference is made to the text thereof." (Record, p. 22).

This Stipulation of Fact, along with others, was certified to this Court to be the record in this case. In passing, we note that

> "Louis J. Lefkowitz, Attorney General of the State of New York, attorney in this action for defendants . . . agrees that this stipulation constitutes the record of fact in this case which would have been made by plaintiffs and defendants . . . had a trial taken place." (Record, p. 27).

The activity of the appellees in the courts has its parallel in their activities with respect to enforcement of those provisions of law presently involved in the case at bar. An examination of these activities indicates that for years the appellees have enforced *all* of the statutes indicated and required university employees to conform their conduct in a manner consistent with the prohibitions contained therein.[1] The appellees for several years distributed a booklet to all members of the university's academic staff which booklet contained the Regents Rules and the underlying statutes (Record, pp. 233-255) along with a certificate requiring consent that the laws contained in the booklet constituted the terms of their employment. It should be observed that in the laws distributed, wherever the words "Section 12-a" appear, one can find an asterisk and at the bottom of the page, "now Section 105" (Record, pp. 237, 238, 241, 244 and 247). It should also be noted that the booklet which was distributed to these appellants bears the date 1959 (Record, p. 233), one year after the recodification of Section 105.[2]

It is plain from what has been stated above, that it is not the appellants who would obfuscate the issues in this

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[1] Resulting in a continual "application" of the complex.

[2] Interestingly enough, the asterisk method was consistently utilized by the defendants in all of their printed briefs in the three courts of the federal system in which this case has been argued. The same method was followed in the brief filed by these defendants in this Court in opposition to appellants' Statement as to Jurisdiction; see Motion to Dismiss Appeal by Attorney General of the State of New York, pp. 97-99; (but see Brief for Bd. of Regents *et al.*, pp. 31, 32 and 35. Evidently, appellees overlooked p. 33 of their brief, since the change is not made on that page).

case. We might also make here a general observation concerning the argument of appellees. It seems that the argument is based upon the philosophy that tactics should play a central role under the adversary system. Like the attorney who has no hesitation in "springing" a surprise witness in a lawsuit, the appellees have suddenly reversed a position long held and have done so on the eve of the oral argument of this Court. Their attempt by this technique to rid themselves of the problems presented by the above mentioned statutes is forlorn. It is impossible, by even the most adroit conclusory characterization to eliminate from this lawsuit the objective, indeed, categorical disqualification from public employment which these statutes embody.

A. With respect to the New York Education Law, Section 3021.

The contention which appellees make with respect to this section need not detain us long. It is claimed that the section, by its specific terms, applies only to a person employed as a "superintendent of schools, teacher or employee in the public schools, in any city or school district of the state . . .". From this language the appellees reach the facile conclusion that the section "does not apply to State University or to the facts of the present case". (Brief for Bd. of Regents, *et al.*, p. 16). The appellees do concede, however, that Education Law, Section 3022, is a part of this lawsuit. Upon reading this last named section, we discover that it directs the Board of Regents to

> ". . . adopt, promulgate, and enforce rules and regulations for the disqualification or removal of . . . faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the State . . . who violate the provisions of Section Three Thousand Twenty-one of this Article . . .". New York Education Law, § 3022.

The reference to Section Three Thousand Twenty-one could hardly be more specific.

B. With respect to New York Civil Service Law, Section 105(3).

The contention of appellees with respect to this section is similarly transparent. This contention has its genesis in the proposition that former Civil Service Law Section 12-a is presently embodied in Subdivisions (1) and (2) of Civil Service Law, Section 105. At this point, the appellees note that Education Law, Section 3022 refers only to "the original Section 12-a and makes no reference to the recodified Section 105." (Brief for Bd. of Regents, *et al.*, p. 6). On the basis of this fact, the appellees conclude that only Subdivisions (1) and (2) of Section 105 can be considered by this Court. The argument has no merit. The appellees fail to point out that this litigation was sparked originally by the distribution throughout the State University system of the "Regents Rules on Subversive Activities" and the requirement that University Professors certify in writing that the Regents Rules "*as well as the laws cited therein* are a part of the terms of my employment" (emphasis supplied). Among the laws "cited therein" is Civil Service Law, Section 105(3) (See Exhibit "7" to Stipulation of Fact, Record, p. 233 at p. 250).

Appellees have consistently maintained that Section 105, as well as former 12-a, applies by its terms to a ". . . teacher in a public school or academy or in a state college or in any other state educational institution . . ." (see brief for Bd. of Regents, *et al.*, p. 11).[8] Thus there can be no doubt as to its present application to these appellants.

[8] Appellants maintain that Section 12-a was not attacked as unconstitutional in the original *Adler* case and was not considered in its application to university personnel.

Additionally the shallowness of the appellees' contention is strikingly illustrated by the fact that the requirement that Section 105 shall be a part of the appellants' contract terms remains in full force even under the new procedures adopted by the State University.

> "§ 3. PROCEDURE FOR APPOINTMENTS.
>
> Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University . . . the officer authorized to make such appointment . . . shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents." (Record, p. 276).
>
> "FURTHER RESOLVED, that any person presently employed by the University shall not be deemed ineligible or disqualified for continuance in his employment . . . provided he is found qualified for such continuance . . . in accordance with the procedures proscribed in said new Section 3 . . ." (Record, p. 277).

Appellees make further claim that even if Sections 3021 and 105(3) are a part of this lawsuit, that this Court should abstain from ruling upon them. The appellants have previously set forth their views with respect to whether or not this case is one for abstention (Appellants' main brief, p. 108). We wish only to add here that the additional grounds stated by appellees for abstention (the amendment to the Penal Law, Sections 160 and 161, effective on September 1, 1967) should have no bearing on this lawsuit. At present, the only laws in force are Penal Law, Sections 160 and 161. It is with respect to these laws that the appellants have been and are required to regulate their conduct. It is with respect to these laws that the appellants have been injured and it is these laws which are presently being administered.

We cannot know whether or not the new law will be amended or indeed whether it will become effective in any form on September 1, 1967. There will be yet, before that date, another session of the New York State Legislature and we cannot speculate now as to the final form in which the law will become effective.[4] The further argument of appellees that "we are not presently concerned with the removal of anyone for treasonable or seditious acts or words" (Brief for Bd. of Regents, *et al.*, p. 15) avoids the issue. Appellants must consent to regulate their conduct within the standards embodied in the statute and furthermore the obligation to do so is a continuing one.[5]

The complex is thus "applied" to these appellants in a much more insidious manner than if action were being taken under it. The requirement that university professors conform their conduct to standards which prohibit innocent activities and speech presents a constitutional issue of the highest rank. Especially is this so where the standards imposed are incapable of being ascertained.[6]

POINT II

Appellees make claim that "the constitutional issue is the power of the State to safeguard the public service from disloyalty, . . ." (Brief for Bd. of Regents, *et al.*, p. 11) and suggest, as did the Court below, that it would be dan-

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[4] As the amended law now stands, the Penal Law definition of treason has been omitted, thus leaving the Penal Law definition reference in Section 105(3) of the New York State Civil Service Law undefined with respect to treason.

[5] The claim that "we are dealing only with the hiring of personnel at the State University" (Brief for Bd. of Regents *et al.*, p. 13) is contrary to fact. See N. Y. Education Law Section 3022 (". . . Who are ineligible for appointment to *or retention* . . ." [emphasis supplied]); see also N. Y. Civil Service Law Section 105 (". . . nor shall any person employed . . . Be continued in such employment . . ."); see also "Regents Rules" Section 244(4) (". . . or retention . . ."). Thus the obligation to conform continues after employment.

[6] Thus the case at bar involves not only questions of inquiry but also the constitutionality of statutory standards as the context in which the inquiries are made.

gerously anomalous to proscribe the advocacy of violent overthrow of government in all parts of the United States except in the "breeding grounds" of the future leaders of our nation (Brief for Bd. of Trustees, *et al.*, p. 10).

In fact the constitutional issue in the case at bar is not the power but the extent and limits of the power as well as the constitutionality of the means utilized by the State herein. To attack a strawman by posing the case as being one which turns upon grounds indicated by the appellees is to formulate an issue which does not exist. Appellants have never suggested that the status of a university professor should insulate him in the commission of *acts* which are prescribed to the ordinary individual. Indeed, one of the constitutional issues raised is the fact that the freedoms of speech and association of the university professor are by reason of this complex more restricted than those of the private individual. Thus, appellants have advanced a definition of academic freedom which involves the right to speak, act and believe in the same manner as an ordinary individual without fear of loss of employment (Brief for appellants, pp. 84-85). Additionally, appellants have shown that a university professor is disqualified from public employment on the basis of innocent conduct and speech (Brief, p. 32), and merely for holding certain forbidden beliefs (Brief, p. 39), and on the basis of a law which was passed without a legislative showing that an impelling subordinating need existed (Brief, pp. 61-62) to protect the State from the infiltration of its universities by "subversives". Also, appellants have taken what can only be considered to be a reasonable approach to this very difficult constitutional question. Appellants have advanced the proposition that the interest of the State and of society requires at the very least that the speech and conduct of university professors be judged with

the same restrictive standards as this Court would apply in cases involving criminal prosecution (Brief, pp. 42-45). Thus, we have indicated that the complex is unconstitutional by its failure to distinguish between advocacy of doctrine and advocacy which incites to violence and for the reason that it denies employment for "knowing" rather than "active" membership in proscribed groups. In support of their view that knowing membership is enough to disqualify appellants from employment, the appellees rely on the statement in *Adler* that:

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing that the organization stands for, namely, the overthrow of the government by unlawful means." (*Adler v. Board of Education*, 342 U. S. 485 at pp. 494-495; Brief for Board of Regents, *et al.*, at p. 19).

There are significant differences between *Adler* and the case at bar. However, appellants do not rest on these distinctions as it seems that this Court has overruled *Adler* on the above point in subsequent decisions.[7] See *e.g. Scales*

[7] It is plain that *Adler's* holding with respect to knowing membership owes more to *Dennis v. United States*, 341 U. S. 494, than it does to *Garner v. Los Angeles*, 341 U. S. 716 (the contentions of the appellees notwithstanding). The dominant theme which was to underly convictions under the "membership" clause of the Smith Act was set out in the concurring opinion of Justice Jackson in Dennis, *supra*, at p. 577, where he stated:

> "When our constitutional provisions were written, the chief forces recognized as antagonists in the struggle between authority and liberty where the government on the one hand and the individual citizen on the other. It was thought that if the State could be kept in its place the individual could take care of himself.
>
> In more recent times these problems have been complicated by the intervention between the State and the citizen of permanently organized, well-financed, semi-secret and highly disciplined political organizations. Totalitarian groups here and abroad perfected the technique of creating private parliamentary organizations to coerce both the public government and its citizens. These organizations assert as against our government all of the constitutional rights and immunities of individuals and at the same time exercised over their followers much of the authority which

(Footnote continued on following page)

v. United States, 367 U. S. 503; *Noto v. United States*, 367 U. S. 291, *Aptheker v. Secretary of State*, 378 U. S. 500 and *Elfbrandt v. Russell*, 384 U. S. 11. These cases present an irrefutable conclusion of law that the State of New York, as employer, has no legal right to disqualify from public employment membership in proscribed groups which is merely "knowing" and which is unaccompanied by the member's active attempts to further the unlawful ends of the organization. Unlike the *Adler* case, these decisions recognize the critical fact that one may be a member of the group without being a member of the conspiracy. *Adler* is contrary and is in conflict with these more recent decisions. *Adler* embodies a legislative assumption that one who is a member of the group is a member of the con-

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(Footnote continued from preceding page)

they denied to the government. The Communist Party realistically is a state within a state, and authoritarian dictatorship without a republic. It demands these freedoms, not for its members, but for the organized party. It denies to its own members at the same time the freedom to dissent, to debate, to deviate from the party line, and enforces its authoritarian rule by crude purges, if nothing more violent.

The law of conspiracy has been the chief means at the government's disposal to deal with the growing problems created by such organizations. I happen to think it is an awkward and inept remedy, but I find no constitutional authority for taking this weapon from the government. There is no constitutional right to 'gang up' on the government."

Subsequent to *Adler* the "conspiracy approach" was elaborated upon by the Court of Appeals for the Fourth Circuit in *Scales v. United States*, 227 F. 2d 581. *Scales* involved a prosecution under the Smith Act on an indictment charging membership in the Communist Party. The Court declared at p. 587:

"The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes and that all are guilty who join it with knowledge of such purposes; and all that the statute does is apply this fundamental concept of conspiracy to an organization having for its purpose the forceful overthrow of the government."*

* This Court granted certiorari, *Scales v. United States*, 350 U. S. 992 and later reversed, *Scales v. United States*, 355 U. S. 1, on the basis of a memorandum filed with the court by the solicitor admitting that the convictions had to be reversed in light of this Court's holding in *Jencks v. United States*, 353 U. S. at 657. The conspiracy approach has been considerably weakened by this Court's insistence in *Scales v. U. S.*, 367 U. S. 203 and *Noto v. U. S.*, 367 U. S. 291 that "active" membership involves more than the mere "act" of membership.

spiracy and requires the affected individual to come forward and prove the innocence of his conduct, thus conflicting with this Court's determination in *Speiser v. Randall*, 357 U. S. 513.

The standards enunciated by the Court in the decisions referred to above should be extended to cover university personnel, as the interests of the State in safeguarding the integrity of its universities and professors is of paramount importance, see *e.g. Sweezy v. New Hampshire*, 354 U. S. 234.

Of course the constitutional defect of punishment for mere "knowing" membership is further aggravated in the New York system by reason of the fact that the complex assumes a conspiracy—"membership in the Communist Party of the United States of America or of the Communist Party of the State of New York shall constitute *prima facie* evidence of disqualification . . ." (New York Civil Service Law, Section 105(1)(c)), and does not require the State in any dismissal proceeding to prove that the Communist Party presently advocates violent overthrow.[8] In view of these factors, it is submitted that *Adler* does not meet the issues raised by this case.

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[8] In 1958 the Committee on Public Employee Security Procedures for the State of New York made the following recommendation with respect to the then Civil Service Law, Section 12-a:

> "There is one respect, however, in which the Committee believes that an amendment to Section 12-a can make it more workable without jeopardizing the legitimate interests of the individual. In order to discharge a member of the Communist Party from public employ, subdivision (c) of that section would require the discharging officer to prove not only that the employee is a member of the Communist Party but also that the party teaches or advocates that the government of the United States, the state, or its political subdivisions should be overthrown by force or violence or unlawful means. However, after notice and lengthy hearings, extending over more than six months, the Board of Regents of the State of New York has found that the Communist Party of the United States of America and the Communist Party of the State of New York were "subversive"' within the meaning of Section 3022 of the Education Law (known as the Feinberg Law) in that they advocate, advise, teach or embrace the doctrine that the government of the United States should be overthrown by force and violence.[1]

(Footnote continued on following page)

POINT III

Appellees dismiss appellants' argument that the complex is a bill of attainder with the statement that "where, as here, we have no automatic disqualification as the result of a legislative trial, the statutes do not constitute a bill of attainder . . ." (See Brief for Bd. of Regents, *et al.*, p. 26). Embodied within that statement is a concept which can have profound repercussions not only on these appellants but upon all citizens of this nation as well. The appellees declare and the Court below held that a statute may assume guilt without offending the constitutional prohibition against bills of attainder. The acceptance of this view by this Court would effectively destroy a protection which has its origin in a long experience with tyranny. The doctrine of assumption of guilt is alien to most civilized nations. If this Court holds that a Legislature may assume guilt, two small words, "*prima facie*", will have provided the lever with which to destroy an historical prohibition.

(Footnote continued from preceding page)

It seems to the Committee that there is no valid end to be served to require in each proceeding under Section 12-a of the Civil Service Law that in order to prove a *prima facie* case the discharging officer must establish that the Communist Party of the United States of America and the Communist Party of the State of New York teach or advocate the overthrow of the government by force or violence. This fact has been so carefully and repeatedly established that to put the initial burden of proving it in each single case on the discharging officer encumbers the government uselessly and without corresponding gain in protection of the individual.

We therefore suggest that Section 12-a be amended to provide that, since the Communist Party of the United States of America and the Communist Party of the State of New York have been found by the Board of Regents, after notice and hearing, to be subversive within the meaning of subdivision (c) of Section 12-a, membership in either of those organizations shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the service of the state or of any civil division or city thereof." Recommendations of Committee on Public Employee Security Procedures, New York State Legislative Annual—1958 (P. 70-71).

This recommendation was accepted by the Legislature. See New York Civil Service Law, Section 105(1)(c). See also declaration of intent which prefaced amendment (Record P. 299)."

Appellants believe that this aspect of the case presents this Court with an issue of fundamental and far reaching importance. We urge this Court to reject the doctrine of assumption of guilt and place our reliance upon the oldest (*Cummings v. Missouri*, 71 U. S. 277) and the most recent (*United States v. Brown*, 381 U. S. 437) decisions of this Court in this area. Of course, both *Cummings* and *Brown* can be distinguished. But the rationale of these cases does not turn on factual distinctions. These cases embody the principle that a legislature may neither declare nor assume guilt consistent with the constitutional prohibition against bills of attainder. Indeed, a legislative assumption of guilt seems to be "the very name of tyranny".

CONCLUSION

For the reasons stated above and in appellants' original brief, the complex should be declared unconstitutional.

Respectfully submitted,

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